

DECISION



13526 PM-I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195154

DATE: April 23, 1980

MATTER OF: Irving Zuckerman - [Claims for Retroactive Temporary Promotion with Backpay and Compensation for Time Away from Permanent Duty Station]

DIGEST:

1. Employee, GS-11 who was granted temporary promotion with backpay from February 11, 1974, to April 29, 1974, to GS-12 claims additional pay on ground that under Turner-Caldwell, 56 Comp. Gen. 427 (1976), his detail began June 10, 1973, not October 11, 1973. Claim is disallowed since entitlement to temporary promotion with backpay under Turner-Caldwell does not begin until 121st day of detail to establish higher-grade position and GS-12 position was not established until October 11, 1973.
2. Employee claims compensation for non-work hours while away from permanent duty station on temporary assignment on ground that he was unable to return to his home during temporary duty assignment. Employee has no entitlement since 5 U.S.C. § 5542(b)(2)(B) (1976) provides that time in travel status from official duty station of employee is not hours of employment unless travel involves work, travel under arduous conditions, or results from administratively uncontrollable event, and none of those factors are present.

This action concerns the appeal of Mr. Irving Zuckerman, a Supervisory Consumer Safety Officer employed by the U.S. Consumer Product Safety Commission, from the disallowance of his claims for additional backpay and for compensation for time spent on temporary assignment in other than a work status.

The first claim, filed with the agency in 1975, requested backpay for a detail to a higher-graded position than the GS-11 position that Mr. Zuckerman occupied from June 10, 1973, until April 29, 1974. The agency agreed that Mr. Zuckerman was due a temporary promotion retroactive to February 11, 1974, rather than to June 10, 1973, as

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claimed by the employee. Although Mr. Zuckerman began performing the duties which matured into the position of Supervisory Consumer Safety Officer, GS-696-12, on June 10, 1973, no established position description existed until October 11, 1973. The agency counted a 120-day period from October 11, 1973, through February 10, 1974, as exempt from entitlement to a temporary promotion and awarded Mr. Zuckerman a retroactive promotion effective February 11, 1974, with backpay.

Mr. Zuckerman's claim was considered under the decision in Everett Turner and David L. Caldwell, 55 Comp. Gen. 539 (1975). We held therein that employees detailed to higher-grade positions for more than 120 days, without prior Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the periods beginning with the 121st day of the details until the details are terminated. Subsequently, in Marie Grant, 55 Comp. Gen. 785 (1976) we ruled that the Turner-Caldwell decision applied retroactively to extended details to higher-grade positions. In Reconsideration of Turner-Caldwell, 56 Comp. Gen. 427 (1977), we reaffirmed our earlier determinations. However, we also held that an employee may not be allowed backpay for the performance of duties which should be classified at a higher-grade and that it was necessary for the employee to satisfy the requirements for a retroactive temporary promotion in order to be entitled to such promotion. See 56 Comp. Gen. 427 at 430 and 431.

The Civil Service Commission has promulgated implementing guidance concerning Turner-Caldwell, supra, in Bulletin No. 300-40 dated May 25, 1977, subject: GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher-Graded Jobs (B-183086). Paragraph 4 of that bulletin states: "For purposes of this decision, the position must be an established one, classified under an occupational standard to a grade or pay level." (Emphasis in original.) This statement emphasizes that the crucial aspect in the Turner-Caldwell line of cases is that the position or duties to which an employee is detailed be those of an established and classified position. See also Patrick J. Fleming, B-191413, May 22, 1978.

As indicated above, it is the position of the agency that Mr. Zuckerman was not assigned to a higher-graded position on June 10, 1973, since the higher-graded position of Supervisory Consumer Safety Officer was not established until October 11, 1973,

when position description number CPSC-0161 was approved and issued. Mr. Zuckerman has not submitted any evidence to the contrary. Thus, Mr. Zuckerman did not begin performing the higher-graded duties of an established position, classified under an occupational standard until October 11, 1973. Since an agency's discretionary authority to retain an employee on detail to a higher-grade position continues no longer than 120 days, Mr. Zuckerman was awarded a temporary promotion with backpay retroactive to February 11, 1974. Therefore, we sustain the agency's determination that Mr. Zuckerman was not entitled to a retroactive temporary promotion until the 121st day after October 11, 1973. However, the 121st day of the detail was February 8, 1974, not February 11, 1974, and the U.S. Consumer Product Safety Commission should take necessary action to correct the effective date of the temporary promotion and pay any additional pay due in connection therewith.

Mr. Zuckerman also appeals the disallowance by our Claims Division in its certificate of settlement dated March 30, 1979, of his claim for additional pay incident to a temporary assignment from July 10, 1978 to August 8, 1978, to a duty station in Buffalo, New York, away from his official duty station in New York, New York. He filed a claim with the agency requesting overtime compensation for all of the time he spent at the temporary duty station outside his normal working hours of 8:00 a.m. to 4:30 p.m. The agency denied his claim on the grounds that he was not ordered to perform overtime work and did not perform any. Our Claims Division disallowed the claim on the same grounds.

Mr. Zuckerman bases his appeal on the belief that he should be compensated for the additional time period from 4:30 p.m. when his work day ended until 8:00 a.m. when his work day began since he was not able to return home in the evening. Mr. Zuckerman states his reasoning as follows:

"My normal services may not have extended beyond the 8-hour workday. But, by the mere fact that I was forced to be away from home every evening after 4:30 PM, I was rendering a service to the U.S. Government. Otherwise, why would I be there in Buffalo? As I have stated previously, I was not in Buffalo because I wanted to be there. I was not free to use my time after 4:30 PM as I saw fit. I had to be where the U.S. Government had ordered me to be. Thus I was rendering a service to the Government. (Emphasis in original.)


B-195154

"Since the Constitution forbids slavery and peonage; and since I was not under military command, I ought to be paid for the service I rendered to the Government by being where the Government had ordered me to be."

Mr. Zuckerman also states that if he cannot be paid for "overtime," then he should be paid for "time."

Section 5504 of title 5, United States Code (1976), provides that for pay computation purposes an employee shall have a basic workweek of 40 hours. Section 5542 of title 5, United States Code (1976), provides for payment at an overtime rate for work in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Since Mr. Zuckerman admits that he did not work in excess of 40 hours per week or in excess of 8 hours per day, he is not entitled to any additional pay unless such pay may be granted incident to being in a travel status (assignment away from his official duty station). In this connection 5 U.S.C. § 5542(b)(2)(B) (1976) provides that time spent in a travel status away from the official duty station of an employee is not hours of employment unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively. Inasmuch as Mr. Zuckerman did not perform either work or travel under the conditions stated above during the hours for which he claims additional compensation, he is not entitled to any overtime pay. See 57 Comp. Gen. 43, 47 (1977).

Accordingly, the disallowance by our Claims Division of Mr. Zuckerman's claim for additional compensation while at Buffalo, New York on temporary duty assignment is affirmed.


Acting Comptroller General
of the United States